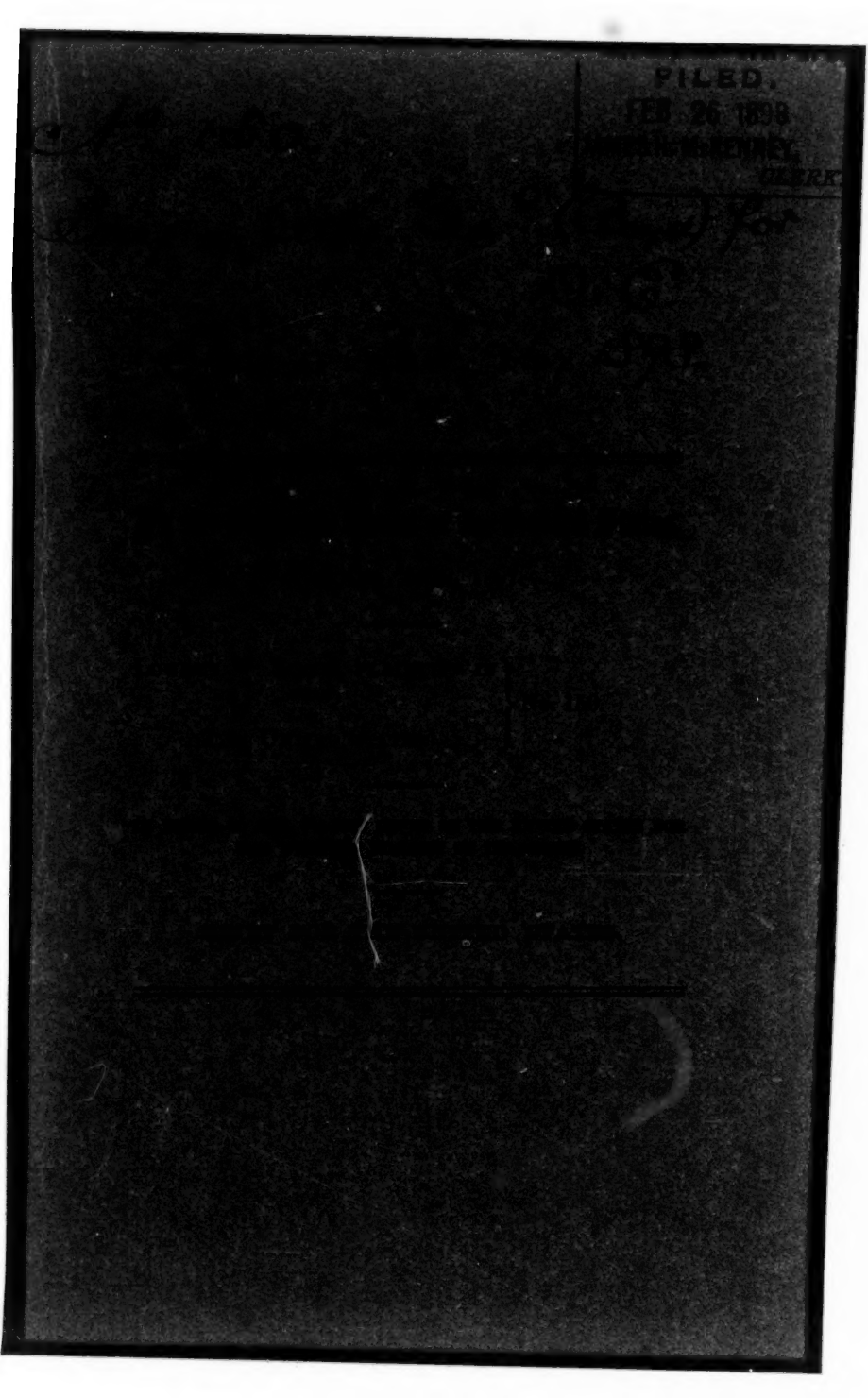
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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

LOWREY W. HUMES, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 150.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Lowrey W. Humes was tried at the November term, 1895, of the above-mentioned court, and convicted. The bill of indictment in the case contains nine counts, and was drafted under section 5485 of the Revised Statues.

This section reads as follows:

> SEC. 5485. Any agent or attorney, or any other person instrumental in prosecuting any claim for

> pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land warrant issued to such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall for every such offense be fined not exceeding five hundred dollars, or imprisonment at hard labor not exceeding two years, or both, at the discretion of the court.

The sections of the Revised Statutes providing for fees for agents, attorneys, and other persons are 4785 and 4786. The fee is limited to $10, except in such cases where the Commissioner of Pensions directs a fee not exceeding $25 shall be paid.

The jury returned a verdict of guilty as to the first and third counts, a verdict of not guilty as to the second, fourth, seventh, eighth, and ninth counts, and a nolle prosequi was entered by the United States attorney as to the fifth and six counts. So, the matters for consideration by the court here are confined to the first and third counts, upon which the conviction and sentence were had in the court below.

The first count, after the formal parts, charges that Lowrey W. Humes

> unlawfully, with force and arms, did wrongfully withhold from William Anderson a large sum of money, to wit, $486.40, the same then and there being part of a pension allowed and due by the United

States to the said William Anderson, and the said Lowrey W. Humes then and there being an agent for and a person instrumental in prosecuting a claim of said William Anderson for the pension aforesaid, contrary to the form of the statute, etc.

The third count charges Humes, in the same language, with withholding $517.20 of the pension of one Isaac Bloodson.

POINTS AND ARGUMENT.

There are thirteen assignments of error, all based upon the judge's charge to the jury, but there were no exceptions taken and noted as a foundation for these assignments. An examination of the record shows that the plaintiff in error requested only one special instruction, which will be found at the close of the charge of the court, page 181 of the record, and was as follows:

> Unless you find from the evidence that the defendant was the attorney, agent, or other person engaged in prosecuting the pension claims of Anderson, Haynes, and Bloodson, then the court instructs you to find for the defendant.

In response to this request the court said:

> I think I have given this instruction in the general charge, and, believing the charge on this point is sufficiently full, further instruction is declined.

To this ruling of the court Humes then and there excepted. This exception is the basis of assignment of error No. 3.

In the charge of the court (Rec., p. 175) will be found the following language:

> Now, with these general observations that are applicable and will be kept in mind by you throughout

> in the case, we come to the testimony in the case; and in respect to that it appears in the statute, as you have observed, that it is necessary in order to make the case against the defendant (first) that he must have been the agent or attorney of the pensioner or he must have been instrumental in the prosecution of the pension claim before he falls within the category of the persons who are subject to the provisions of the statute, and (secondly) he must withhold from the pensioner all or a part of what was due the pensioner claimant; so that two propositions are necessary to be established: That defendant was an agent or instrumental in the prosecution of the claim, and (secondly) that he withheld from the pensioner money that belonged to the pensioner—some part of the pension that was allowed.

This was not only the substance of the request for special instructions, but was much more full and explicit, and completely covered the ground in the special request.

When a jury has been properly instructed in regard to the law on any given subject, the court is not bound to grant the request of counsel to charge again in the language prepared by counsel, or if the request be given before the charge is made the court is not bound to use the language of counsel, but may use its own language so long as the correct rule upon the subject requested be given by the court. (*White* v. *United States*, 164 U. S., 100, 105; *Allen* v. *United States*, 164 U. S., 500; *Davis* v. *United States*, 165 U. S., 373, 378.)

The first assignment of error, part of the eighth assignment, and the eleventh assignment relate to a failure on the part of the court to give certain instructions (pp. 196, 198, 199).

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The record does not show that there was any request for such instructions. In *Isaacs* v. *United States* (159 U. S., 487, 491), Mr. Justice Brown said:

> It is no ground for reversal that the court omitted to give instructions where they were not requested by the defendant. It is sufficient that the court gave no erroneous instructions. (*Pennock* v. *Dialogue*, 2 Pet., 1, 15; *Tex. and Pac. Rwy. Co.* v. *Volk*, 151 U. S., 73, 78.)

The second, fourth, fifth, sixth, seventh, part of the eighth, ninth, and tenth assignments of error relate to alleged error in the instructions given to the jury by the court. (Rec., pp. 196, 197, 198, and 199.)

No exception is shown by the record to have been taken to any portion of the instructions set forth in these assignments. The only exception so far as the charge is concerned is that heretofore noted as the basis of assignment of error No. 3. Instructions of the court are not subject to review, unless the bill of exception shows that they were excepted to. (*Tucker* v. *United States*, 151 U. S., 164, 170; *St. Clair* v. *United States*, 154 U. S., 134, 153.)

The twelfth and thirteenth assignments of error are based upon the alleged fact that the verdict was against the weight of the evidence. In a criminal case whether a verdict is contrary to the evidence can not be considered in this court, if there was any evidence proper to go to the jury in support of the verdict. (*Crumpton* v. *United States*, 138 U. S., 361; *Moore* v. *United States*, 150 U. S., 57, 61.)

The foregoing covers every point which is presented by the record in this case for the consideration of the

Supreme Court. The plaintiff in error has filed an elaborate brief, much of which is devoted to matters de hors the record, and which the court will, it is assumed, not undertake to pass upon.

However, as the plaintiff in error has included in his brief a great deal of the testimony produced upon the trial and has undertaken to present the case in the view that the same should not have gone to the jury, it is perhaps as well, in behalf of the Government, to call the attention of the court to the character of the case and what was really involved in it.

There were only two issues of fact for the jury. The first was whether Humes was the agent or attorney for the pensioners named or was instrumental in prosecuting the claims for pensions; and, if the jury should find that he occupied either relation to the pensioner and his claim, then the second issue was whether he wrongfully withheld from the pensioner the whole or any part of the pension allowed and due the pensioner before it reached the hands of the pensioner. There was ample evidence to go to the jury upon both of these issues, as will be ascertained by an examination of the record.

There was no dispute about the fact that the attorney named in the application for pension of the several persons described in the bill of indictment was one Deadrick; that Deadrick and Humes had their offices together in the same room; that before any of the pensions were granted by the Government, Deadrick went out of business, and that Humes continued in the office and carried on the correspondence and active work necessary for the procurement of the pensions. W. M. Ragsdale, special

pension examiner, testified to and exhibited numerous writings of Humes in the possession of the Commissioner of Pensions concerning the pension claim of Isaac Bloodson and others. (Rec., pp. 105–106.) They were in Humes's handwriting, some of them signed, however, in the name of W. H. Childs, successor to Deadrick & Co. (Rec., pp. 106, 107.)

Some of the correspondence was printed, but directed to be answered at post-office address, 17 West Court street, Memphis, Tenn., which was Humes's office. (Rec., p. 107.) This witness also testified to and produced papers in Humes's handwriting in William Anderson's Case. (Rec., p. 111.) Isaac Bloodson testified (Rec., p. 57) that in the prosecution of his claim he had Deadrick first, then Copeland, and then Humes, and that Humes procured his pension for him. Joshua Haynes testifies (Rec., p. 84) that he applied to Deadrick first, and then Humes took the case and procured the pension; that Humes was in Deadrick's office. Peter Finley testified (Rec., p. 37) that Humes wrote William Anderson, telling him to come in and see him about his papers, and that witness carried Anderson to see Humes in response to this letter, and that it was about the pension claim of Anderson.

Humes testified himself (Rec., p. 125) that Deadrick was the first representative or attorney for the pensioners; that Deadrick had his desk in his (Humes's) office; that he kept the records there, and when Deadrick left Memphis he left his pension records and papers in the table in Humes's office. Humes stated, further (Rec., p. 126), that he then began to receive the mail in reference to

these pension claims and kept up the record; that the office was at first at 13 Madison street; that he (Humes) moved to 17 West Court street in August or September, 1894, and took all the pension papers and files with him and had mail all changed to the latter address. Humes admits (Rec., pp. 126, 127) that he wrote to the Department and made calls in these cases in the name of Deadrick and W. Childs & Co. and in the name of parties, and signed the names of firms and parties.

The attention of the court is called to these parts of the evidence to show that there was evidence sufficient to go to the jury upon the issue of fact as to whether Humes was the agent or attorney of the pensioners, or was instrumental in prosecuting the claims for pensions, and it was for the jury, after hearing the witnesses, observing their manner and demeanor upon the stand, and considering all the circumstances, to say whether or not, as a fact, Humes had been instrumental in prosecuting these claims for pensions, or any of them. When this fact was established to the satisfaction of the jury, then the remaining issue was to be considered, namely, whether Humes wrongfully withheld from these pensioners, or any one of them, any part of the pension allowed and due such pensioners before it reached the hands of the pensioner.

The charge upon the first count of the indictment upon which Humes was convicted was that he wrongfully withheld from William Anderson $486.40 of his pension. The amount due Anderson for arrears of pension, and which was the amount of the first check issued to him, was $536.40. This was admitted to be the amount, and Humes,

in his defense, exhibited the check for $536.40 with Anderson's mark on the back, witnessed by Humes himself and one Purcell. William Anderson testified (Rec., p. 36) that Humes paid him only $50. In this statement Anderson is corroborated by Peter Finley (Rec., p. 38), who carried Anderson to Memphis in response to Humes's letter, and was at the wagon yard, where Anderson came immediately with the $50 from Humes's office and showed it to Finley. Finley was also present with McLaughlin in Humes's office on the same day when Humes stated that he paid Anderson only $50, that his pension was $60, and that he (Humes) had retained $10 as his fee allowed him under the law. (Rec., p. 39.)

H. W. McLaughlin (Rec., p. 47) corroborates Peter Finley as to visit to Humes's office on the day that the $50 was paid to Anderson; also as to the fact that Humes said that Anderson's pension money had come in that morning's mail, $60, and that he (Humes) had retained $10 as an attorney's fee, and had paid the balance, $50, over to Anderson. Humes also stated to this witness, when asked what evidence Anderson had that his pension had been granted, that his (Humes's) books would be evidence that his pension had been granted. Humes stated in the conversation with Finley and McLaughlin that the reason this first payment was small was that it had been granted under the new law. (Rec., p. 48.)

Of course, Humes, in his testimony, denied the statement of Anderson and flatly contradicted Finley and McLaughlin as to their conversation with him and what he said. He also undertook to corroborate himself in this testimony by employees about his office who seem to

have been always conveniently present to witness the mark of illiterate, ignorant pensioners who were unable to sign their names. But there was certainly enough evidence to go to the jury upon the issue of fact as to whether or not he retained wrongfully William Anderson's pension, or any part of it.

Very much the same state of facts exists as to the pension of Isaac Bloodson, for the wrongful taking of whose pension the third count in the bill of indictment is based and upon which Humes was also convicted. Bloodson's check for arrearages was shown to be $567.25. (Rec., p. 61.) Bloodson testifies that Humes got his pension for him, and when he went to get it, about Christmas, 1894, Humes paid him only $50; further, that he never saw any paper or made any mark the day he received the money (Rec., p. 61); that the $50 he received he took to Mrs. Snyder and she counted it. (Rec., p. 59.) Mrs. Snyder (Rec., pp. 70, 71) corroborates Bloodson, and says, in substance, that she counted the money he had on the occasion referred to and there was $50. B. J. Copely, another witness, corroborates Bloodson; says that witness counted Bloodson's money and he had only $50. (Rec., p. 79.)

As in the case of Anderson, Humes denied Bloodson's statement and swore that he delivered him the check, and introduced some testimony on the part of employees about his office which tended to corroborate; but this was, as in the case of Anderson, an issue of fact, to be determined by the jury, and there was sufficient evidence to go to the jury upon the issue.

These matters are called to the attention of the court in this brief in order that the court may see the nature of the controversy which was tried in the court below, and that the judge did not exceed his province in submitting these questions of fact to the jury, and especially is it thought to be due to present this statement from the testimony in the case, as the plaintiff in error has incorporated a great deal of the testimony as a part of his brief. It is not deemed necessary to comment upon the entire fairness and fullness of the charge of the court to the jury. The United States insists that the charge covers every view of the case necessary to be presented to the jury; that it is entirely impartial, and that the principles of law are correctly laid down. It will be found in the printed record, beginning on page 172 and ending on page 181, and the attention of the court is directed to it in case the assignments of plaintiff in error are considered at all. The charge of the court is as follows:

> GENTLEMEN OF THE JURY: The indictment against the defendant in this case and on which he has been put to trial is predicated on section 5485 of the Revised Statutes, which reads as follows:
>
> "Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension or bounty land than is provided in the title pertaining to pensions; or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the

pension or claim allowed and due such pensioner or claimant, or the land warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall for every such offense be fined not exceeding five hundred dollars, or imprisonment at hard labor not exceeding two years, or both, at the discretion of the court."

This indictment as originally drawn and returned into court by the grand jury contained nine counts, but as the case now comes to you, in view of the previous record thereof, the defendant is on trial on only three of those counts, and in the discharge of your duty you are concerned with only the three, viz, the first, third, and seventh counts in this indictment. The first one reads as follows: "The grand jurors of the United States within and for the western division of the western district of Tennessee, in said sixth circuit, duly elected, impanelled, and sworn and charged to inquire in and for said district aforesaid, in said circuit, upon their oaths present that L. W. Humes, yeoman, of the county of Shelby, State of Tennessee, and late of the circuit aforesaid, to wit, on the first of April, 1895, in the county of Shelby aforesaid, State of Tennessee, and in the circuit and division of the district aforesaid, to wit, Memphis, in said county and within the jurisdiction of this court, unlawfully and with force and arms did wrongfully withhold from William Anderson a large sum of money, to wit, $486.50, the same then and there being part of pension money allowed and due by the United States to the said William Anderson, and the said Lowry W. Humes then and there being agent for and a person instrumental in prosecuting a claim of said William Anderson for a pension aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

The third count is: "And the grand jurors aforesaid upon their oaths present that the said Lowry W. Humes, on the first of April, 1895, at Memphis aforesaid, in the division and district aforesaid, unlawfully did wrongfully withhold from one Isaac Bloodson a large sum of money, to wit, $517.20, the same then and there being part of the pension allowed and due by the United States *and* the said Isaac Bloodson, and the said Lowry W. Humes then and there being an agent for and a person instrumental in prosecuting a claim of said Isaac Bloodson for the pension aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

And count seven is as follows:

"The grand jurors aforesaid upon their oaths aforesaid further present that the said L. W. Humes, on the first of April, 1895, at Memphis aforesaid, in the division and district aforesaid, unlawfully did wrongfully withhold from one Joshua A. Haynes a large sum of money, to wit, the sum of $116.00, the same then and there being part of the pension money allowed and due by the United States to said Joshua A. Haynes, and the said L. W. Humes then and there being agent for and a person instrumental in prosecuting the claim of said Joshua A. Haynes for the pension aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

These three several counts in the indictment charge the defendant with independent and distinct offenses growing out of distinct transactions—viz, in the first count he is charged with withholding from William Anderson a part of a pension due to Anderson, and in the third count the charge is in respect to the Bloodson pension claim and withholding that from him, and in the seventh count with

the Joshua A. Haynes claim or pension—and the defendant is on trial on each of these counts. It is competent for the jury, in such disposition as they make of the case, to convict the defendant, if they convict him at all, on all of the counts—three of the counts—and in respect to all three of the transactions, or it is competent for the jury to convict him on one or more, and acquit him on one or more. The defendant, by his plea, says he is not guilty of the charge, and, having thus denied the charge, it devolves upon the Government, before it can ask a conviction, to establish his guilt by proof, on one or more of the counts, to the satisfaction of the jury and beyond a reasonable doubt.

If the Government has so established his guilt by proof on one or more of the counts or all of them, then the jury should convict. If the Government has not so established his guilt on all or any of the counts, then the jury should accordingly acquit. The defendant is presumed to be innocent, as every other citizen within the peace of the State is presumed to be. It is a presumption that attends him at all times, under accusation as well as otherwise, and is an answer to any accusation against him until that presumption is overturned by proof on the part of the Government which establishes his guilt beyond a reasonable doubt. Now, the rule in a criminal case in respect to the quantity of proof necessary is different from what it is in a civil case.

In a civil case the jury may decide the case according to the preponderance of the testimony—that is, as it may weigh in favor of the one side or the other in the scale of the controversy—but in a criminal case and as against the defendant that is not sufficient. The proof must satisfy the jury of his guilt beyond a reasonable doubt. Now, what is a reasonable doubt

is a matter somewhat easier of conception than definition, but the proof of his guilt, in order to overturn the presumption of innocence, should be such as to exclude all reasonable doubt. It doesn't necessarily exclude all doubt. By a reasonable doubt is meant a doubt arising out of the evidence in the case or the want of sufficient evidence.

It is not a doubt suggested by the imagination outside of the proof. It is not a doubt suggested by any feeling of mercy, by any feeling of sympathy, for the one side or prejudice against the other; but is an honest, substantial misgiving as to the guilt of the defendant, after the jury has attentively and conscienciously weighed or considered all the testimony in the case on both sides. If, after you have considered all of it with the view honestly to ascertain the truth and with no other motive (as you will), you are not satisfied beyond a reasonable doubt, why you should acquit. If, after you have so considered it, the jury believes or feels that notwithstanding the proof the defendant may be innocent, that is a reasonable doubt and the defendant should be acquitted.

If, after the jury has carefully considered the evidence faithfully and earnestly with a view to ascertain and declare the result, the jury is unable to say how it is, why that is a reasonable doubt, and the defendant in such a condition of your mind as that is entitled to an acquittal. If, however, it excludes all reasonable doubt after the exercise of your reason and judgment as men, why then there would be no reasonable doubt, of course, and the defendant should be convicted. Now, the defendant is permitted to testify in his own behalf, and the fact of his motive or interest to escape punishment no longer disqualifies him as a witness. He is a

competent witness, and it becomes your duty to accept him as competent, and to duly weigh and consider his testimony, and the motive that he labors under, no longer disqualifying him as a witness, goes to his credibility and is to be considered by you as a circumstance in determining what weight you will give to his testimony given in his own favor.

You should consider the fact that he labors under a strong motive to escape conviction and punishment or disgrace by testifying to a state of facts that exculpate him from the charge against him, and you are at all times to weigh what he says in connection with that circumstance as going to his credibility, and, having done so, you give to his testimony such weight as you may think it entitled to under all the circumstances. You will, of course, look to his manner, as you would the manner of any other witness on the stand, and the reasonableness or unreasonableness of his testimony; to its agreement or disagreement with your experience and with the other testimony in the case, both positive and circumstantial. If there is a conflict of evidence, as I think there is in this case, it is your duty first to so reconcile the evidence, if you can do so, as to make each witness or set of witnesses speak the truth. If the conflict is irreconcilable or of such a character as that it cannot be reconciled by the jury consistently with honesty on the part of the witness, then it is the duty and the province of the jury to say which witness or set of witnesses has stated the truth and which has not.

If in what the court says to you in restating the testimony or in indicating the inferences to be drawn from it the court misstates the testimony, according

to your recollection, or if the court expresses a view of it, if it does express any, not in accordance with your view after you have carefully considered it, it is your duty to follow your own recollection and your own view, the court merely meaning to try to assist you by such instructions as may be properly given; but it is your duty to finally pass upon the question of the defendant's guilt or innocence. Discrepancies between witnesses as to time, growing out of the frailty of human memory, *is* ordinarily not a circumstance that effects the testimony of or discredits a witness. It is too common an experience that memory fails as to dates, time, and distance, and it is only when the jury believe that a date has been deliberately fixed upon and adhered to with a view to pervert the fact that that would be a circumstance that discredited a witness's testimony.

Now, with these general observations that are applicable and will be kept in mind by you throughout in the case, we come to the testimony in the case, and in respect to that it appears from the statute, as you have observed, that it is necessary in order to make the case against the defendant (first) that he must have been the agent or attorney of the pensioner, or he must have been instrumental in the prosecution of the pension claim before he falls within the category of the persons who are subject to the provisions of the statute, and (secondly) he must withhold from the pensioner all or a part of what was due the pensioner claimant, so that two propositions are necessary to be established: That def't was an agent or instrumental in the prosecution of the claim, and, secondly, that he withheld from the pensioner money that belonged to the pensioner, some part of the pension that was allowed.

Now, desiring to get the jury down to the real issue in this case as it comes to you, leaving the jury free to find for itself, the court is of opinion that, considered in reference to either the Government's proof or the defendant's, and with reference to the written evidence or the oral, that the defendant was instrumental in the prosecution of these claims in such sense as that if he withheld the money he would be within the provision of the statute and guilty.

That brings you to the fact, then, of whether or not he did withhold these pension claims. Taking up, then, the count in reference to the Anderson claim: Now, there is a direct conflict between the defendant and his own evidence and that of the claimant, Anderson, as to who got the proceeds of that check. Anderson states that he had paid him $50.00 of it at his office in person and in money, and that that is all of it that he ever obtained, whereas the defendant, Humes, says that he delivered to him the check for the full amount, and that he went away from his office to the bank to get it cashed, and that he had nothing further to do with it and knew no more of it. Now, both of these statements can't be true.

Whether they are deliberately false or the result of mistake or misconception, they are not both true. The claimant stands in his testimony directly opposed to that of the defendant upon that point, and that is the real issue in respect to this Anderson transaction, viz, who got the proceeds of that check? If Mr. Humes got and retained the proceeds or retained any part of it above the notary's fee, then he is guilty, whereas if Anderson got it that is the end of the case so far as that count is concerned, or if, under the rule stated, you have a reasonable doubt

about how that is, the defendant is entitled to an acquittal. Now, then, in such a conflict as that you naturally look for corroboration of Anderson on the one hand and Humes on the other, and with that view I will call your attention briefly to what the testimony of supporting witnesses on the one side and the other is as I recollect it. Anderson says he went immediately to the stock yard, to Peter Finley, with his hand on the $50.00 from the time he left Humes's office until he got to the yard, and that he there made known the fact to Peter Finley, and Peter Finley counted the money, and in that Peter Finley substantially agrees with Anderson as to that fact. Afterwards Peter Finley says that he went in company with Mr. Laughlin, but in the absence of Anderson, to the office of Mr. Humes and inquired about this $50.00 that had been paid to Anderson, or, rather, about the Anderson pension; that they went there for the purpose of finding out why it was that Anderson got no more than fifty dollars, and they state—himself and Mr. Laughlin, who appears to be an intelligent man and is a member of this bar—they went to Mr. Humes' office, as they stated, and called him into another room, and asked him about this thing. They say that Mr. Humes said that the check had come that morning (I am quoting it substantially), and that ten dollars of it went as an attorney's fee, and that he paid Anderson fifty dollars, and if you believe that Humes stated that, that corroborates Anderson's testimony as to his version of this transaction, and if you believe that Mr. Humes deliberately and understandingly made that statement to Peter Finley and Mr. Laughlin, as they understand it, viz, that he paid him $50.00 and retained $10.00 as attorney's fee, it would be a strong circumstance against Mr. Humes.

It is contradictory to what he now states before the jury on the stand, and it is inconsistent with the transaction as he now details it, and is inconsistent with his innocence, as it is now maintained. Now, did they understand Finley and did Finley understand them in that conversation? Its value depends on the fact, of course, that it was deliberately made by Humes, and that it was correctly understood and communicated by Finley and Laughlin. It requires that to make it of value as an admission; but if understood, and correctly testified to by them, and deliberately made by Humes, as I have stated to you before, it becomes a strong circumstance. It is impossible that what he said then could be true, and that what he now says could be true; and it is impossible, in view of the facts now before you, that a statement of that sort could be true and he could be innocent, because if he paid him $50.00 he don't pretend that he otherwise paid him the pension money, and it would warrant you in the inference that he withheld the remainder of it.

Now, in determining whether that was deliberately and understandingly made, you may look to the circumstances in which you went to Mr. Humes' office and the time that was devoted to the inquiry of the answer—if it was only a few minutes, to that circumstance; if it was where he was pressed with other business, to that circumstance—and determine whether it was deliberately and understandingly made, because if it was, in the court's opinion, that is a strong circumstance in this case. Now, then, when you turn away from that side of it and the corroboration, Mr. Humes says that Mr. Laughlin and Mr. Finley misunderstood him; that he said to them that there was due Anderson about five hundred and fifty dollars, and that the question of whether it was all or not was not mentioned (I am

stating my recollection of his testimony, and it is for you to remember it), and that they seemed satisfied with that and went away, and that it was but for a moment and casual, and that they misunderstood him if they understood it as they say. Now, how is this? That is the question for you to say, if you can.

Mr. Humes denies that, and denies that he paid Anderson $50.00 in money at all on that occasion or a cent; and while we are on the subject of fees I may as well get that out of the way, because there is enough of dispated matter here. Mr. Finley didn't claim in his testimony before you that he had any charge against that fund or any claim against Anderson on account of which he could have retained it or held it, except the fifty cents, notary fee, and says that he did not retain any more, but that he turned him over the check, and that fifty cents was brought back to him by Saunderlin. Now, then, the section under which he is indicted is a section intended——

JURYMAN. You had reference to Mr. Humes, didn't you? You said Mr. Finley.

The COURT. Yes, sir.

Under the section under which he is indicted it is intended to prevent withholding from the pensioner any part of his claim, and it would under that section have been lawful to charge his notary fee of fifty cents; and the subsequent statute, the one under which this pension is issued, prohibits a notary from charging that fifty cents, and requires that he shall perform that service for nothing; but if Mr. Humes did charge the fifty cents, the subsequent statute doesn't make that a criminal offense; and if he charged the fifty cents and is, without more, otherwise guiltless about this matter, there is no offense.

So that, did he withhold from Anderson all or any substantial part of that pension? If so, he is guilty, and you should convict him; and if not, or if you have a reasonable doubt, acquit him. Now, in addition to Mr. Humes' statement on that point, he supports himself by the witness Sanderlin, a colored man, who swears that he went with Anderson, a colored man, to the bank, identified him, and that he obtained the money on that check; that he knows Anderson as a soldier; was acquainted with him in the Army. Now, if that is true, what Anderson said about it can not be true, and if what Sanderlin says is true, if Mr. Humes had made the statement to Finley and Laughlin, which they say he did, it would not have been a true statement; so that there is, on that point, a hopeless conflict in the evidence—in its terms and its implications—and you have got that to deal with.

Now, that is what Sanderlin says, and Mr. Humes, junior, the half-brother of the defendant, upon that same point states that he remembers cashing the check and paying the money to Anderson, and that it was done on the 8th of October instead of the 29th, and the time and method of payment is in conflict in that respect. Anderson and the witnesses and circumstances, so far as they corroborate Anderson, tend to show a payment on the 29th of October, whereas the books of the bank show that the check, whoever got it, was paid on the 8th of October. Now, did Humes get that check on the 8th of October and keep it until the 29th, and then pay the fifty dollars to Anderson, as Anderson states and as the corroborating testimony of Anderson shows, or was it paid on the 8th to Anderson or to Hume?

Now, young Humes, and by that I mean his half brother for the present, says that he remembers the

transaction; has a personal recollection of it because it was a large amount paid to a darkey and because he afterwards saw Anderson and remembered when he did see him, and recognized and now recognizes him as the man to whom he actually paid the cash. That is the corroboration of Humes so far as the Anderson transaction is concerned. The Government's contention is that in fact Humes took that check there on the 8th of October himself and procured it to be cashed, and that the younger Humes has no recollection of it at all except such as he has, in the interest of his brother, actually led himself to believe since, and that on the 29th of October that he kept that money until that time and then paid Anderson fifty dollars, as Anderson says, and in respect to which he is corroborated by Finley and Laughlin and by the elder Finley, so far as the date when his cow was paid for is concerned. Now, you have got the conflict to deal with. What interest did Finley have and Laughlin have to testify to anything but what they understood to be the truth, and did they correctly understand it? You may look to the fact that Sanderlin was in the employ, to an extent at least, of Humes, and that the younger Humes was his half brother, and to every other fact and circumstance in the case that may enable you to decide that manifest conflict between the proof on the part of the Government and that on the part of the defendant, so far as the Anderson transaction is concerned. Among other things, you may consider for what it is worth the fact, as the case comes before you, that Mr. Humes, so far as it is developed, was doing or attempting to do this work for nothing but the notary's fee, as a question affecting his testimony. Then, on the part of Anderson, you may consider the fact whether Anderson knew before he drew that pension the approximate amount of it,

and the fact that personally he made no complaint about it, and what would or what has been Anderson's motive for undertaking to claim that he only got $50.00 when he got all. These are all things for you to consider.

Another circumstance is, if Humes started out to swindle Anderson out of his pension you may consider the fact that, according to what Anderson says, out of a sum of $536.40 Humes took all of it except $50.00. It is not a case where he undertook to take some of it—a small part of it—but took all of it except $50.00. If Humes withheld from Anderson his certificate of pension and the other evidence of the amount of his pension with the view to keep concealed the real amount from Anderson and his counsel or his friends, that would be a circumstance against Mr. Humes, if that was his purpose, if you believe that, and you may consider the fact if it be so that he withheld them as bearing on that. If, however, he offered the papers to Anderson as substantially he says, and Anderson simply declined to take the papers, why then there would be nothing improper in Mr. Humes putting the papers away. Now, I have undertaken, somewhat tediously, to direct your attention to this conflict over the Anderson transaction because the most proof in the case is in regard to that and the most extensive conflict is in regard to that, and the testimony on behalf of the Government, particularly in the corroboration by Finley and Laughlin, makes the case against Humes in regard to the transaction stronger than it is in regard to the other, and if you should convict the defendant Humes on the Anderson transaction, it wouldn't necessarily follow that you would convict him on the third and seventh counts, in regard to the Bloodson and Haynes transactions.

Nothing would follow one way or the other about that, because the fact that a man is guilty of a crime in respect to one transaction is not a ground on which you could convict him on another. Each offense must stand on its own merits. Having thus called your attention to the testimony and attempted to sum it up and to state the conflict in regard to the Anderson claim, I pass for a moment, and only a moment, to the Bloodson transaction, because what has been said to you generally and in respect to the Anderson claim applies in a large way to the Bloodson claim. Now, Bloodson states that Humes paid him out of $567.20 just $50.00 also, and that is all that he ever got.

Bloodson says that he got that on the 27th of December, after Christmas, what Humes did pay him. Humes says that he endorsed and delivered the check to him. I should have said, in stating the evidence in conflict on the Anderson claim, that in addition to what Humes says and Saunderlin and the younger Humes says that that colored man, Franklin, also says, as you will remember, that he saw Anderson leave the office in company with Saunderlin to go to the bank, with the check in his hand, and so that corroborates Mr. Humes' statement on that subject. You have, then, Anderson, with such corroboration as the two Finleys and Laughlin furnish, and Humes, with such corroboration as Franklin, Saunderlin, and Mr. Humes—his half brother—furnish, to deal with, together with the circumstances, as you may find it, about the time when that payment was made. Now, passing to Bloodson: Humes says, on the contrary, that he paid Bloodson the 24th of December, the day before Christmas—that is, that he endorsed the check and delivered it to him just as he did in the Anderson case, and

that he told Saunderlin to go with him to the bank and show it to him; and Saunderlin says he did so, and went to the doorstep and nodded to the cashier, Mr. Humes, junior, which was recognized as indicating that he knew him, and Mr. Humes says that he cashed the check; that he remembers it, and recognizes Bloodson on account of his peculiarly tall appearance and white hair and whiskers, and Franklin also says that Bloodson was there, and went off on that day, and Mr. Humes's son, in addition, says that he was at his father's office on the 24th day of December and saw Bloodson there, and saw him talking to his father, and says, practically, nothing beyond that.

Well, of course, if Bloodson was there on the 24th day of December, as the son says, that corroborates what Humes says about that and what Saunderlin says about it, and would also corroborate what the half-brother says about it, and Bloodson is corroborated in his statement by Mrs. Snyder and her daughter, who say that he spent the 24th at their house all day at work. Well, now, he couldn't have been there on the 24th all day at work and been here at the bank getting that money, and there is another conflict; and what has been said to you is applicable, in a general way, to that.

Then passing to the seventh count, which involves the Haynes transaction, Haynes says that the amount due Haynes was $232.40, and that out of that he gave him money, so that when he deposited $75.00 in the bank he had $41.00 left, and paid $1.00 of that on a debt that he owed, and carried home with him $40.00, which would make, I believe, $116.00, and would make exactly half the amount coming from him, except the odd cents. So that, as the case is testified to by these old colored men, Mr.

Humes took all of Anderson's money except $50.00—took out of $536.40—and of Bloodson's $567.20 took all of that but $50.00, and took half of Haynes's. Now, of course, it is a minor matter, but in considering this testimony you take into account also the intelligence of the witnesses and their reliability as a medium for correctly understanding and correctly communicating the facts known to such witness. You look to their manner on the stand before you, whether that is frank, open, free. The fact of a witness's ignorance don't discredit the witness. It is a circumstance merely to determine how far he is reliable and how far he understood the situation and could tell it. An ignorant man could be just as honest as an intelligent one, so far as he could understand the fact. Now, this pension law, under which the defendant is indicted, is a provision intended to protect. It is a new phase of the old problem in legislation of protecting the weak against the strong, and was designed, among other things, to protect ignorant pensioners against all impositions by men who undertake to be instrumental in the prosecution of their claim and then withhold from them what was due them and convert it to their use.

You take this case now and consider all the testimony, both direct and circumstantial, and in doing so you are simply discharging the duty which the law has devolved upon you, most likely unwillingly. The Government has brought you here by the power of its process and has put you in the jury box, exacting from you some of your time, which every citizen owes the Government, and you have been sworn to try the case according to the law and the facts, and when you enter upon the discharge

> of that duty you dismiss from your consideration anything like prejudice, sympathy, friendship, ill will, or any such thing whatever. You will earnestly and conscientiously try to find out what the truth is and declare it without respect to persons, position, or other consideration, and after you have done that, if you are satisfied of the defendant's guilt beyond a reasonable doubt, so that your judgment and conscience would rest easy on a conviction, why, then, convict, and if you are not so satisfied acquit him.
>
> Now you can take this case, and the court will be in session until five o'clock, and, knowing that some of the jurors desire to get away, if I knew you would be able to dispose of the case to-night, I would open court to see if you are agreed to-night; but the jury may retire now and report about five, after having considered for that length of time whether you have agreed or whether you think you can agree to-night if the court is open; but you should not be in such hurry that you do not give this case the attention its importance demands.

However, as stated before in this brief, and as now reiterated, the position of the United States is that there is but one assignment of error based upon an exception taken so as to bring it within the rule of law well established by this court for review here, and that is the third assignment of error based on the refusal of the court to give the special instruction requested at the end of the charge on page 181 of the record.

JAS. E. BOYD,
Assistant Attorney-General.

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